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Chairman: Mr. MADEJ (Poland)
(Vice-Chairman)

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AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION

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In the absence of Mr. Lamptey (Ghana), Mr. Madej (Poland), Vice-Chairman, took the chair.

The meeting was called to order at 3.25 p.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10, A/49/355; A/C.6/49/L.5)

1. Mr. NEGA (Ethiopia) said he supported the Commission's recommendation that the draft articles on the law of the non-navigational uses of international watercourses should be elaborated in the form of a framework convention, for it would serve not only as a guideline for States in the process of negotiating and adopting specific watercourse agreements, but would also provide legally binding general principles and rules on the matter, which would be particularly important in the absence of specific agreements.

2. An appropriate balance should be maintained among the various aspects, conflicting interests and principles arising from the use of international watercourses. The sovereign right of a State to use its natural resources, including water resources, within its territory and the need to promote cooperation with other watercourse States, taking into account mutual interests and benefits, represented the principles underlying the non-navigational use of international watercourses. Ethiopia was pleased that that widely recognized view had found its unequivocal expression in draft articles 5 and 8. As the Commission had rightly observed in paragraph 8 of its commentary on draft article 5, a watercourse State was entitled to make use of the waters of an international watercourse within its territory, for that right was an attribute of sovereignty and was enjoyed by every State whose territory was traversed or bordered by an international watercourse.

3. The fundamental principles, of equitable and reasonable utilization and participation set forth in article 5, raised a problem regarding the application of that article, namely, discovering what factors and criteria should be used to determine an equitable and reasonable utilization. It would be very risky to try to establish universal and generally applicable criteria for all international watercourses. However, under article 6, the Commission had suggested certain factors that should be taken into account. In Ethiopia's opinion, the list, which was incomplete and rather vague, might not always serve the purpose of objectively determining what constituted equitable and reasonable utilization; under certain circumstances it might even lead to some imbalance in weighing up the interests and uses (past, existing and potential) of watercourse States.

4. The general obligation to cooperate set forth in article 8 supplemented article 5 and highlighted the very objective of the draft articles as a whole. The obligation to cooperate was aimed at achieving the optimal utilization and adequate protection of an international watercourse. Cooperation between watercourse States was also provided for under parts IV and V of the draft articles and generally involved the utilization, development and preservation of

an international watercourse. Ethiopia wished priority to be given to promoting cooperation in those fields.

5. With regard to the provisions of articles 3 and 4 on watercourse agreements, his delegation recognized the importance of adapting the agreements to suit the characteristics of each watercourse and the needs of the States concerned. However, it wished to point out that such agreements should be in conformity with the fundamental objectives and guidelines set forth in the draft articles. The possibility of adapting the provisions of the articles to suit the characteristics and uses of a specific international watercourse, as provided for in draft article 3, should be clarified to dispel any doubts about a possible challenge by a watercourse State of the fundamental principles of the draft articles, in particular the principles of equitable and reasonable utilization and participation.

6. As to the relationship between the draft articles and existing bilateral and regional watercourse agreements, the Ethiopian delegation felt that such agreements should remain valid as long as they did not contradict the fundamental principles and objectives set forth in the draft articles, and the parties to such agreements wished to continue to be bound by and apply them.

7. As far as article 7 was concerned, his delegation endorsed the Commission's attempt to clarify the relationship between articles 5 and 7 by stating in its commentary that in the event where the equitable and reasonable utilization of an international watercourse might cause significant harm to another watercourse State, the principle remained the decisive criterion in balancing the interests at stake. While understanding the doubts expressed by some members of the Commission regarding the usefulness of article 7 in general, and questioning the appropriateness of raising the issue of compensation, Ethiopia was prepared to accept the present wording of the article, taking into account the overriding importance of the principle of equitable and reasonable utilization and the need to address the concerns expressed by other watercourse States.

8. Mr. POLITI (Italy) said that the draft articles on the law of the non-navigational uses of international watercourses and the Commission's commentaries on them constituted a comprehensive and well-balanced set of rules, supported by state practice. The Italian delegation agreed with the solutions proposed for some of the more delicate issues broached.

9. Examples would include the basic provisions on the equitable and reasonable utilization of international watercourses contained in articles 5 to 10 and the provisions relating to the settlement of disputes dealt with in article 33. In both cases, more ambitious goals were certainly appealing but probably unadvisable, at least at that stage in the drafting of the text. All the same, the realistic approach of the draft had not prevented the search for a set of principles governing the conduct of States and concrete guidelines for the negotiation of future agreements.

10. In particular, the Italian delegation welcomed the prominence given, in the area of the settlement of disputes, to impartial fact-finding, a mechanism which

Italy had always considered extremely useful in avoiding and resolving environmental disputes.

11. As to the type of instrument to be adopted on the basis of the draft articles, the Italian delegation confirmed its preference for a binding instrument, namely, a framework convention laying down the general principles and rules governing the non-navigational uses of international watercourses. Such a convention could be concluded through a plenipotentiary conference or through the direct involvement of the Sixth Committee in the review of the draft articles. From a practical standpoint Italy favoured the second solution, in other words, to entrust the Sixth Committee with the task of submitting the text of the convention to the General Assembly for adoption.

12. Turning to the matter of State responsibility, and specifically the question of the consequences of acts characterized as crimes under article 19 of part one of the draft articles, his delegation maintained its view that the distinction between international crimes and delicts should be retained. The nature of the consequences of wrongful acts should not be the same for international crimes as for international delicts. He therefore welcomed the Special Rapporteur's intention to submit to the Commission's forthcoming session proposals relating to the consequences of crimes, in the form of articles or paragraphs which would appear in parts two and three of the draft articles.

13. With regard to the instrumental consequences of internationally wrongful acts, including pre-countermeasures dispute settlement procedures, the Commission had provisionally adopted articles 11, 13 and 14, while deferring action on article 12, which dealt with conditions relating to resort to countermeasures. His delegation looked forward to the submission of a complete set of articles on countermeasures at the Commission's next session and commended the Drafting Committee and the Special Rapporteur for their efforts to that end. It was pleased that the Commission had reaffirmed its intention to conclude by 1996 the first reading of the draft articles on State responsibility.

14. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation doubted the wisdom of the decision to treat separately activities having a risk of causing transboundary harm and activities in fact causing harm. Yet it welcomed the significant results achieved by the Commission. Italy attached the utmost importance to the subject of international liability, which was at the centre of the growing debate over environmental issues within the international community. It was pleased to note that the rules on prevention of transboundary harm set out in the draft articles adopted by the Commission appeared to be consistent with State practice and its most recent development.

15. Italy welcomed draft article 21 on State responsibility. On first reading, it favoured the proposed alternative A of article 21, which provided for a State's residual liability for breach of its obligations of prevention. It wished to emphasize, however, that duty of due diligence and State liability for failure to comply should not in its view exclude from the regime to be

established the concept of liability without fault of the State of origin. There should be a duty to make reparation also where no violation of rules on prevention had taken place; and it should likewise be residual in character. In other words, reparation by the State of origin for transboundary harm should be invoked only after unsuccessful resource to the mechanisms and procedures for reparation of damage established under the civil liability regime.

16. Mrs. BOUM (Cameroon) said she was pleased that the Commission had resumed consideration at its forty-sixth session of the draft Code of Crimes against the Peace and Security of Mankind, adopted on first reading in 1991, and that it had adopted at that same session the final text of a draft statute for an international criminal court. This draft (procedural law) was closely linked to the prior adoption of a draft code (substantive law) clearly defining the crimes which would be brought before the Court.

17. The Commission in fact recognized, in the commentary on article 20, that it was not the real function of the statute to define new crimes any more than it was to codify authoritatively crimes under general international law. But it did not seem to draw any logical inference from that statement and did not cite, among the sources of applicable law, subsequent treaties defining such crimes. Under the circumstances, her delegation wondered how the draft Code, once ratified by States, would be incorporated into the Statute of the Court.

18. Concerning article 23, the Commission had decided to give the Security Council the power to refer crimes of aggression to the Court. Article 23 in fact provided that a complaint alleging an act of aggression could not be brought unless the Security Council had first determined that a State had committed the act of aggression that was the subject of the complaint. Any decision of the Security Council being political rather than legal, her delegation wondered if the criminal court could, when judging an individual, undertake a legal review of such a decision in respect of a State. If not, the only issue for the Court would be to determine if the individual concerned was responsible for the act of the State, already judged illegal by a political body. Cameroon believed that, if the criminal court was conceived of as lacking the power to take a legal decision on the crime of aggression, then it should not have jurisdiction with respect to that crime.

19. Her comments should not be taken as an opposition in principle to the establishment of an international criminal court but as an expression of concern for the impartiality and objectivity of the court that would be set up.

20. With regard to the law of the non-navigational uses of international watercourses, she welcomed the Commission's adoption of the solution of a framework agreement and its decision not to extend the scope of the future convention to confined ground water. She especially welcomed the fact that the Commission had highlighted the general duty of cooperation incumbent upon watercourse States, to which Cameroon, as a signatory of four watercourse agreements, attached particular importance. The remaining reservations on the draft were not insurmountable obstacles, and her delegation therefore believed that it would not be necessary to convene a diplomatic conference to adopt it.

21. Mr. VERESHCHETIN (Chairman of the International Law Commission) thanked the members of the Committee for their interest in the Commission's work, and said that the Commission could not fulfil its mandate of codification and progressive development of international law without their support and suggestions.

22. In that connection, he was particularly pleased to note that the amendments made to the draft statute for an international criminal court on the basis of views expressed by Governments at the previous session had been received favourably by the Sixth Committee. No doubt there were still divergent views and more work needed to be done on the draft, but it should be underscored that a broad measure of agreement had already emerged on the most fundamental question relating to the draft statute, namely, the desirability of establishing an international criminal court. Although the question had been under consideration in the United Nations for nearly half a century, the idea of establishing such a court had gathered momentum only in recent years, and the momentum had grown with each new report of atrocities committed in some part of the world.

23. In his view, the international community should seize that historic opportunity to add to the body of international law and thus renew its commitment to the rule of law. Moreover, with the work on the draft statute completed, there would be more time to devote to the draft Code of Crimes against the Peace and Security of Mankind.

24. With regard to the law of the non-navigational uses of international watercourses, many delegations had recognized that the rise in world population and the expansion of industrial activities demanded the adoption of generally acceptable rules to assist States in ensuring proper utilization and conservation of freshwater resources. On the more specific point of the nature of the final instrument to be elaborated, many delegations had spoken in favour of a framework convention while others, fewer in number, had expressed a preference for model rules or guidelines.

25. Noting the impatience of the Committee to see the work on State responsibility brought to a conclusion, he pointed out that the Commission was faced with two extremely complex issues: the consequences of crimes, and countermeasures. The Commission nevertheless expected to complete the first reading of the draft articles by 1996.

26. As to international liability for injurious consequences arising out of acts not prohibited by international law, the debate had confirmed the extreme difficulty of the subject, which involved sensitive policy decisions and a reconsideration of some traditional concepts of international law. While it was still too early to declare that the Commission would be able to reconcile the various positions on the topic, it was gratifying to note that the members of the Committee found the approach taken in the first draft articles to be coherent and well-balanced.

27. In conclusion, he emphasized the importance the Commission attached to the International Law Seminar, which enabled young professors and lawyers to become

acquainted with the work of the Commission and a number of specialized agencies based in Geneva. As in 1994, the Commission would make every effort to involve the Seminar participants in its own work by inviting them to deal with one of the topics currently on the agenda.

The meeting rose at 4.10 p.m.